

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Lebanon, Missouri)

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RM-10567

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AUG 10 2005

Federal Communications Commission
Office of Secretary

To: The Office of the Secretary
Attention: Assistant Chief, Audio Division

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OPPOSITION TO
PETITION FOR RECONSIDERATION

KDAA-KMOZ, LLC ("KKL"), by counsel, hereby files this Opposition to the "Petition for Reconsideration" ("Petition") filed July 25, 2005, by Four Him Enterprises, L.L.C. ("Four Him") in the above-captioned rulemaking proceeding (No. RM-10167). KKL is licensee of Station KDAA, Channel 248A at Rolla, MO, that would be directly affected by the outcome of this proceeding.¹ KKL requests that the Audio Division dismiss the Petition as procedurally defective and violative of KKL's rights under Section 316(a)(1) of the Communications Act. In short, the Commission cannot modify KKL's license for KDAA without first issuing an Order to Show Cause to KKL. In opposition, the following is shown:

On April 23, 2001, Four Him filed a Petition for Rule Making seeking to upgrade its station KHCR (now KHZR) from Channel 249C3 to 249C2 at Potosi, MO. That would require, *inter alia*, the substitution of Channel 276A for Channel 248A at Rolla, MO. By *Notice of Proposed Rule Making (Eminence, MO, Encinal, TX and Tilden, TX)*, 16 FCC Rcd 13915 (Alloc. Br. 2001), the

¹ KKL is seeking leave to file this Opposition in a separate pleading being filed today.

former Allocations Branch of the Audio Services Division² set forth separate proposals to amend the FM Table of Allotments, Section 73.202(b) of the Rules. One of those proposals, by Ozark Broadcasting, Inc. ("Ozark"), was to allot Channel 276C3 to Eminence, MO, as its first local aural transmission service at reference coordinates: 37-16-07 NL and 91-15-05 WL. Ozark's proposal for Eminence would not affect KKL. However, on September 4, 2001, the date for filing comments, Four Him filed a counterproposal in May Docket 01-151 essentially duplicating its April 23, 2001, proposal. In addition to the change of channels at Rolla, Four Him's proposal would also require the downgrade of Station KJEL(FM), Lebanon, MO, from Class C to Class C0.³

On September 20, 2002, the Commission released an *Order to Show Cause* (DA 02-2225) requiring Ozark to show cause why KJEL should not be downgraded to Class C0 status. Ozark maintained that it never received a copy of the Order to Show Cause by certified mail, and that when it learned of the proposed KJEL downgrade, Ozark belatedly filed a response to the *Order to Show Cause* and on April 1, 2003, Ozark filed an application (File No. BPH-20030401ABZ), to maintain Class C status.

The Commission dismissed Four Him's petition for rule making in RM-10567 that proposed the substitution of Channel 249C2 for 249C3 at Potosi because Ozark objected to the downgrade of KJEL to Class C0. On August 23, 2003, Four Him filed a petition for reconsideration of the Commission's action and Ozark opposed it. That petition was denied in *Memorandum Opinion and Order*, DA 05-1715, released June 24, 2005 ("MO&O"). The Audio

² Now, the Audio Division, Media Bureau.

³ Four Him also requires the substitution of Channel 248A for Channel 276A at Linn, MO.

Division found that Ozark had "a statutory right to be notified of the proposed modification of the Station KJEL license and an opportunity to file a response," citing *Fostering the Expanded Use of UHF Television Channels (Stockton and Modesto, California)*, 4 FCC Rcd 2d 839 (1966). Since the Commission did not provide Ozark with notice, the Four Him Petition for Rule Making was dismissed. On July 25, 2005, Four Him filed its Petition.

Because the litigation was ongoing and the Commission had not acted, on July 12, 2004, KKL filed a "Statement for the Record and Request for Expedited Action on Application and Request to Update FM Data Base." Therein, KKL took no position on how the subject matter of the litigation should be resolved, but noted for the record that the pendency of the rule making petitions had prevented action on KKL's application (File No. BPH-20030701AMT) to relocate the antenna of KDAA, Rolla, MO, to the site shared by station KZNN, Rolla, MO, which is licensed to an affiliate of KKL. KKL showed that either Channel 248A or Channel 276A could be utilized/operated from the site specified in the application meeting all minimum distance separation requirements, assuming the other changes proposed in the Four Him proposal are made. As a result, on June 14, 2005, the Audio Division granted KKL's application conditioned on the outcome of this proceeding. Any construction of the facility would be at KKL's risk.

With the Audio Division's denial of Four Him's Petition for Reconsideration in the MO&O, KKL thought this matter was settled and that KDAA would not be required to change its operating channel. However, on July 25, 2005, Four Him filed its Petition and a separate Joint Petition for Approval of Settlement Agreement and for Other Relief which would result in Four Him paying Ozark \$100,000 to settle their differences.⁴ As shown in KKL's separately filed

⁴ KKL is filing a separate opposition to the Joint Petition for Approval of Agreement and for


Opposition, the Joint Petition violates applicable law. There are at least three major flaws in the Joint Petition that require its dismissal. First, the Joint Petition violates the requirements of *Window Notice for Universal Settlements of Pending Rule Making Proceedings to Amend the FM Table of Allotments*, DA 05-1688, released June 20, 2005 ("Window Notice") under which the Joint Petition was ostensibly filed. The Window Notice restricts eligibility to parties who filed timely expressions of interest in rule making proceedings where a Notice of Proposed Rulemaking ("NPRM") was released on or before June 14, 2005. No NPRM has been released in RM-10567, the proceeding where Four Him proposed the modification of the license of KDAA, so RM-10567 is not eligible under the Window Notice for settlement. As a second ground, in MM Docket 01-151, Four Him filed a counterproposal that proposed the modification of the license of KDAA, but that counterproposal never appeared on public notice. As a result, KKL never had a right to respond to the counterproposal. As a third ground, the Joint Petition proposes to modify the license of KDAA, but the Commission has not issued to KKL an *Order to Show Cause* pursuant to Section 316 of the Communications Act, as the Audio Division's MO&O teaches, is an applicant's right. KKL is not a party to the Agreement of Settlement between Four Him and Ozark. Since the Joint Petition is defective, there is no good ground for Four Him to seek reconsideration of the MO&O.

While KKL stated that it was willing to accept a construction permit for KDAA conditioned on the outcome of MB Docket 01-151, such statement does not amount to an abandonment of KLL's rights. Unless, and until, KLL is served with an Order to Show Cause and given an opportunity to comment, its license cannot be modified.

In light of the foregoing, KKL respectfully requests the Audio Division to deny Four Him's
Petition for Reconsideration.

Respectfully submitted,

KDAA-KMOZ, LLC

A handwritten signature in black ink, appearing to read "Gary S. Smithwick", written over a horizontal line.

Gary S. Smithwick
Its Attorney

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August 10, 2005

CERTIFICATE OF SERVICE

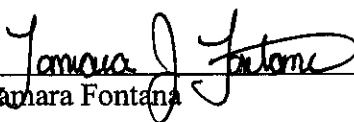
I, Tamara Fontana, do hereby certify that a copy of the foregoing **OPPOSITION TO PETITION FOR RECONSIDERATION** was mailed by First Class U.S. Mail, postage prepaid (or hand delivery, as marked with an asterisk), this 10th day of August, 2005, to the following:

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